SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 75-383

CITY OF LOUISVILLE
FRANK W. BURKE
GEORGE BURTON
COL. C. J. HYDE
LT. ELMER JOHNSON
PATROLMAN WALTER MEDLEY . . Petitioners

versus

MARJORIE GLASSON . . . . Respondent

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

CITY OF LOUISVILLE
FRANK W. BURKE
GEORGE BURTON
COL. C. J. HYDE
LT. ELMER JOHNSON
PATROLMAN WALTER MEDLEY - - *Petitioners*

v.

MARJORIE GLASSON - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 13, 1975.

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals reversed the judgment of the United States District Court for the Western District of Kentucky, in holding that when the Petitioner, Officer Medley, destroyed

the Respondent's poster she was engaged in activity protected by the First and Fourteenth Amendments; and that such action was unreasonable and not taken in good faith. Furthermore, the Court ruled that Petitioners' actions violated Respondent's constitutional rights, and that such actions were undertaken pursuant to an impermissably invidious discrimination remedial under 42 U.S.C. §1985(3). The Court of Appeals further held that the findings of the District Court as to good faith and discriminatory intent were not subject to the "clearly erroneous rule" of Fed. R. Civ. P. 52(a).

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 13, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I.

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that the trial court's findings were not subject to the requirements of the "clearly erroneous rule" of Fed. R. Civ. P. 52(a)?

II.

Did the Court of Appeals below err in reversing the judgment of the District Court below and in holding that Petitioners acted unreasonably and not in good faith and that their actions were pursuant to an impermissably invidious discriminatory intent?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV, Section 1

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. Section 1985

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully

qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C.

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

Fed. Rules Civ. Proc., Rule 56(c), 28 U.S.C.

". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ."

STATEMENT OF THE CASE

The Respondent, Marjorie Glasson, filed suit on July 13, 1971, in the United States District Court for the Western District of Kentucky, under Title 28 U.S.C. Sections 1331 and 1343, and under Title 42 U.S.C. Sections 1983 and 1985. Respondent instituted this action against Petitioners for compensatory and punitive damages which she alleged were a result of a violation, by Petitioners, acting under color of state law, of her civil rights in general and violation of her rights of association, assembly, speech and the right to petition her government for a redress of grievances guaranteed her under the First Amendment to the Constitution of the United States. Respondent simultaneously alleged a violation of her right to the equal protection of the laws guaranteed under the Fourteenth Amendment. Respondent further alleged that in doing the acts complained of Petitioners were conspirators engaged in a scheme to deprive Respondent of her constitutional rights and particularly those hereinabove enumerated.

Respondent's suit was brought against the Petitioners, City of Louisville, Frank W. Burke, then Mayor of the City of Louisville, George Burton, then Director of Safety of the City of Louisville, Col. C. J. Hyde, then Chief of Police of the Louisville Police Department (since retired), Lt. Elmer Johnson and Patrolman Walter Medley, members of the Louisville Police Department both at the time Respondent's claim arose and presently.

In her brief to the United States Court of Appeals for the Sixth Circuit, Respondent conceded that she had no claim against the City of Louisville and stated that she did not wish to pursue her claims against Frank W. Burke and George Burton.

On July 14, 1970, the former President of the United States, Richard M. Nixon, came to visit the City of Louisville. Petitioners were members of the Louisville Police Department, working in coordination with the F.B.I. and the Secret Service, to provide security and protection of the President and the crowd of onlookers as the presidential motorcade passed.

On this day, Respondent was bearing a placard which she alleged and testified read: "Lead us to hate and kill poverty, disease and ignorance—not each other." Petitioners gave conflicting testimony that the message contained the word "Murderer" at the top of the sign in larger and bolder letters.

Petitioners, Johnson and Medley, assigned to duty to protect the President, were patrolling their area which included the intersection of Fourth Street and Guthrie, where Respondent was standing. It was their duty to observe the people and to be alert for any activity within the crowd which would create a disturbance or cause confusion or such conduct that could interfere with the progress of the motorcade, which could jeopardize the safety of the President, or otherwise be hazardous to others in the crowd, composed of onlookers.

The District Court, in its Finding of Fact, accepted the testimony of Petitioners that as the presi-

dential motorcade approached the area adjacent to the point at which Respondent was standing, Fourth and Guthrie, Petitioner—Medley noticed a commotion in the crowd across the street and persons pointing and calling across the street directing attention to the sign being held by Respondent.

Petitioner Medley, after reading the sign, crossed the street and entered into a discussion with his superior, Petitioner Johnson, concerning the contents and effect of the message. It was determined by them that the message was inflamatory and was, in their judgment, creating rancor and resentment in the crowd which could impede the progress of the motorcade and jeopardize the safety of the President, other members of the motorcade and the onlookers in the crowd.

Petitioner Johnson directed Petitioner Medley to go to Respondent and request that she take down the sign; and if she would not voluntarily do so, Petitioner was to take it from her in order to eliminate the hazard. Petitioner Medley approached Respondent and requested that she take down the sign, and upon her refusal to do so, he removed it from her and destroyed it.

The District Court dismissed the Complaint against the Petitioner, City of Louisville, it not being a person under the statute. On March 5, 1973, the case was tried to the court without a jury. At the conclusion of the testimony, the District Court dismissed the suit at Respondent's expense and Judgment for Petitioners was entered. The District Court, entering its Findings of Fact and Conclusion of Law on March 28, 1973, found that Petitioners Johnson and Medley, upon observing

a commotion stirring in the crowd caused by Respondent's sign, acted in good faith and upon reasonable grounds, and that their decision and action in removing the sign from Respondent and destroying it were within the ambit of permissible discretion as it appeared at the time, considering the imminent arrival of the President. As to the 42 U.S.C. 1985(3) claim, the District Court found no evidence of "class based invidious discriminatory animus" as required to be an element of the cause of action.

Subsequently, Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On June 13, 1975, the Court of Appeals reversed the District Court's judgment and remanded the case for further proceedings. In so doing, the Court of Appeals held that the District Court had erred in entering judgment for Petitioners holding that the Petitioners acted in bad faith and with an impermissible discriminatory animus.

It is from the judgment of the Court of Appeals below that Petitioners make application for a Writ of Certiorari.

REASON FOR GRANTING THE WRIT

I.

This Court Should Grant Certiorari to Consider Whether the Court of Appeals Below Erred in Reversing the Judgment of the District Court Below and in Holding That Whether Petitioners Acted in Good Faith and Without an Invidious Discriminatory Intent Was an "Ultimate Finding" and Therefore Not Subject to the "Clearly Erroneous Rule" of Fed. R. Civ. P. 52(a).

The judgment of the District Court that Petitioners acted reasonably and in good faith and without discriminatory intent was, in that regard, a finding of fact, and not a finding of law.

However, in reaching this issue the Court of Appeals held:

> "Although generally findings of fact by a trial court must be accepted by an appellate court unless they are clearly erroneous, F. R. Civ. P. 52(b), (*sic*), determinations, whether called ultimate findings or conclusions of law, that attach legal significance to historical facts may be reversed if upon examination of the record they are found to be erroneous." (Appendix B, p. 36)

In the leading case establishing that a good faith defense exists for law enforcement officers in actions under §1983, *Pierson* v. *Ray*, 386 U. S. 547, 18 L. Ed. 2d 84, 288 S. Ct. 1213 (1967), this Court stated that the question whether law enforcement officers act in good faith is a jury question. In *Pierson, supra,* petitioners were arrested by municipal police officers on

charges of having violated the Mississippi breach-of-peace statute as they attempted to use segregated facilities at an interstate bus terminal. At trial on a §1983 action, petitioners and respondent police officers presented conflicting evidence whether a crowd had gathered at the bus terminal and whether imminent violence was likely. In regard to whether arrests made by the respondents under such alleged circumstances were made in good faith, this Court stated:

> "(The officers) testified in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional then a verdict for the officers would follow even though the arrest was in fact unconstitutional." 386 U. S., at 557.

Under facts strikingly similar to those now before the Court, this Court stated that the question of good faith as a defense to a §1983 action is a question for the finder of fact.

It is beyond dispute that, "To draw a distinction between fact and law is difficult if not impossible to make at times." 5 Moore's Federal Practice, 2d Ed., Sec. 52.05(1), pp. 2689-2690.

In attempting to distinguish between the two, Professor Moore states that illustrative cases will aid in such determination and chooses as his first illustrative case *Plack* v. *Baumer*, 121 F. 2d 676 (3rd Cir. 1941). In this case the court affirmed the judgment of the trial

court sitting without a jury and held that a finding of defendant's good faith in a conversion action was a finding of fact. Professor Moore quotes *Plack* at 121 F. 2d 679,

> ". . . What the court found was that, if the defendant dealt with the collateral in a manner violative of plaintiff's rights as owner, it did so innocently and in good faith, and with no intent to ignore the owner's rights. And that, of course, is a finding of fact."

In Civil Rights cases, the courts consistently have found the issue of a defendant's good faith to be an issue of fact.

In *Sparrow* v. *Goodman,* 361 F. Supp. 566 (1973), a class action brought against law enforcement officers, inter alia, for infringement of plaintiffs' rights to freedom of speech, to peacefully assemble and to petition for redress of grievances, the court denied defendant's motion for summary judgment and dismissal based upon good faith defenses, and held:

> "The existence of their good faith, the absence of an illegal motive (such as suppression of dissent) and the reasonableness of the belief of the Secret Service and other law enforcement officials are questions of fact . . ."

The court ordered that the case would stand for trial upon those and other issues.

Likewise in *Ames* v. *Varveck,* 356 F. Supp. 931 (1973), involving a §1983 action, the court, citing *Pierson, supra,* denied defendant's motions for dis-

missal and summary judgment based upon good faith defenses because the question of good faith was found to be a question not of law but of fact. "Because of the factual nature of defendant police officers' defense, neither dismissal nor summary judgment can be granted." 356 F. Supp. at 938.

Petitioners respectfully submit that if a good faith defense presents a genuine issue as to a material fact for the purposes of 28 U.S.C. Rule 56, a finding upon such a defense constitutes a finding of fact for the purposes of 28 U.S.C. Rule 52(a) and that accordingly such a finding cannot be set aside unless clearly erroneous.

Failure to examine the record within the restraints of the proper test was serious, prejudicial error. The present case, as was *Pierson,* is essentially an inquiry into motive and intent. This is inherently a subjective inquiry, although certain objective standards of reasonableness must be applied. To conduct such an inquiry on the basis of a mere transcript is to ignore the most valuable technique of all—observance of the demeanor of the witness as he testifies. It is for this reason that this Court has stated that "good faith" in a §1983 context is a jury question. In *Rodriguez* v. *Jones,* 473 F. 2d 599 (5th Cir. 1973), the Fifth Circuit applied the clearly erroneous standard to the findings of the District Court in a civil rights action arising out of an alleged illegal entry. The Court states:

> "We are unable to say these findings are clearly erroneous . . . *credibility choices and the reso-*

> *lution of conflicting testimony are within the province of the court sitting without a jury,* subject only to the clearly erroneous rule of Fed. R. Civ. P. 52(a)." 473 F. 2d, at 604. (Emphasis added.)

Even the Sixth Circuit has applied the clearly erroneous test to a finding of good faith in a §1983 action. In *Smith* v. *Ross,* 482 F. 2d 33 (6th Cir. 1973), a civil rights action was brought against a deputy sheriff and others by members of an interracial band. The District Court found that the deputy acted in good faith and the Court of Appeals affirmed because "the facts as found by the district court support its judgment", and "are not clearly erroneous, Fed. R. Civ. P. 52(a)". 482 F. 2d, at 37, at 36. It is difficult to reconcile *Smith, supra,* with the present case.

The only cases cited by the Court of Appeals to support its contention that the clearly erroneous rule is inapplicable are Sixth Circuit cases. The principle case is *Cordovan Associates, Inc.* v. *Dayton Rubber Co.,* 290 F. 2d 858 (6th Cir. 1961), where the issue was interpretation of a written contract. The Petitioners have no argument with the holding expressed therein:

> "The interpretation and construction of a written contract are matters of law within the competence of the Court of Appeals to review and do not come under the clearly erroneous rule." 290 F. 2d, at 860.

The rationale is that a reviewing court is equally competent to review written evidence. However, this

rationale does *not* apply to instances where credibility is central to the issue at hand.

In dealing with mixed questions of law and fact, findings are not binding on reviewing courts when an incorrect principle of law has been applied to the facts. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 396, 68 S. Ct. 525, 92 L. Ed. 746 (1948); 5a Moore's Federal Practice, 2d Ed., Sec. 52.03(2), pg. 2664. This is not the case before us. The District Court and the Court of Appeals are in agreement as to the propriety of a good faith defense in §1983 actions.

Finally, this Court should grant certiorari to reconcile the conflict between the Fifth and Sixth Circuits. In *Rodriguez, supra,* and *Anderson* v. *Nosser,* 438 F. 2d 183 (5th Cir. 1971), the Fifth Circuit correctly labeled the *Pierson* good faith defense as a question of fact for jury consideration. The Court stated:

> "The Pierson test is a subjective one, which of necessity raises questions of credibility, usually within the province of the jury. Here there was testimony from Robinson that he believed he was doing his duty as a peace officer in arresting plaintiffs . . .
>
> We therefore think that there was sufficient evidence to raise an issue of the Pierson defense. The court below submitted this issue under the proper instructions, and we are thus bound by the jury determination of no liability." 438 F. 2d, at 195.

Petitioners respectfully submit that the Court of Appeals erred in refusing to limit their inquiry pursuant to Fed. R. Civ. P. 52(a).

II.

This Court Should Grant Certiorari to Consider Whether the Court of Appeals Below Erred in Reversing the Judgment of the District Court Below and in Holding That the District Court's Finding That Petitioners Acted Reasonably and in Good Faith and Without an Invidious Discriminatory Intent Was Erroneous.

The judgment of the District Court that the Petitioners acted reasonably and in good faith and without an invidious discriminatory intent was not clearly erroneous. Federal Rule of Civil Procedure 52(a) states in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In the present case the Court of Appeals has failed to give due weight to the superior position of the District Court in weighing the conflicting testimony. In *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969), this Court stated:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." 395 U.S., at 123.

It is clear from the record, and Judge Gordon states that "there is, of course, considerable conflict in the evidence" (App. A, pg. 28). Under such circumstances, the trial judge is faced with a clear choice between opposing perspectives. In view of the importance of the credibility of opposing witnesses such a choice cannot be deemed clearly erroneous. In *United States of America* v. *Yellow Cab Company*, 338 U. S. 338, 67 S. Ct. 1560, 94 L. Ed. 150 (1949), this Court has stated:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'." 338 U. S., at 342.

Likewise, this Court has recognized the overwhelming importance of witness credibility in the determination of motive, which is essential to the affirmative defenses of good faith and lack of discriminatory intent:

> "Findings as to the design, motive, and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." 338 U. S., at 341.

The inferences drawn by the District Court from the testimony are supported by the evidence. Such in-

ferences are similarly protected by Fed. R. Civ. P. 52 from undue inquiry.

> "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed. The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility." *Walling* v. *General Industries Co.,* 330 U. S. 543, 550, 67 S. Ct. 883, 91 L. Ed. 1088 (1947).

The present case presents special problems upon review. The sole substantive issue on appeal deals with the inherently subjective inquiry into the intent of the Petitioners. The determination of good faith or discriminatory intent solely from the transcript of the proceedings must be considered with suspicion, at best.

> "With the testimony still fresh in mind, the District Judge has stated his impressions of the credibility of the witnesses who appeared before him. His judgment of the witnesses, given before the passage of time had dimmed the memory of what can never be adequately preserved by a stenographic record, is thus entitled to great weight." *Mazzella Blasting Mat Co.,* v. *Vitiella,* 250 F. 2d 935, 935 (2nd Cir. 1957).

See also: *United States* v. *Oregon Medical Society,* 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 778 (1951).

It must be remembered that the issue on appeal is not whether Respondent was engaged in protected speech. The issue is whether the Petitioners, *in good faith,* believed it necessary to remove her sign from the view of an increasingly hostile audience *to insure the protection of the President of the United States.* Such an inquiry must focus, to a great extent, upon the testimony of the Petitioners.

The right of a defendant in an action arising out of 42 U.S.C. §1983 to establish good faith as a defense is beyond question. *Pierson* v. *Ray, supra.* The rationale for such a defense antedates *Pierson.* Judge Learned Hand stated that the purpose of such immunities (or quasi-immunities) is to encourage conscientious public officials by not "exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2nd Cir. 1949). The Sixth Circuit has recognized this principle as applied to police officers.

> "No one has a constitutional right to be free from a law officer's honest misunderstanding of law or facts in making arrest." *Gabbard* v. *Rose,* 359 F. 2d 182, 185 (6th Cir. 1966); quoting *Agnew* v. *City of Compton,* 239 F. 2d 226 (9th Cir. 1957).

A similar standard has been applied in cases involving First Amendment rights. *Adamian* v. *University of Nevada,* 359 F. Supp. 825 (1973); *O'Brien* v. *Gallo-*

way, 362 F. Supp. 901 (1973); *Pocket Books, Inc.* v. *Walsh,* 204 F. Supp. 294 (1962). *Handverger* v. *Harvill,* 479 F. 2d 513 (9th Cir. 1973), is a §1983 case set in a First Amendment context. The defendant university officials were in a dilemma over whether to stop a "commencement" by anti-war activists and possibly abridge the group's constitutional rights or permit the activity which they had been advised by counsel was *probably* illegal. In holding that all the defendants acted in good faith the Court emphasized the uncertain nature of regulation of free speech. In analyzing their right to suppress the free expression of ideas the defendants had time to reflect in the quiet of their offices; and they had the advice of their legal counsel and two assistants from the Attorney General's office. How different the present case is! Here Petitioners were in a disturbing situation, requiring an immediate decision, involving a question of constitutional dimensions upon which even learned judges have disagreed, with the protection of the President as their responsibility. Although dealing with a warrantless arrest, the words of *Hill* v. *Rowland,* 474 F. 2d 1374, 1378 (4th Cir. 1973), are meaningful:

> "As stated in *Whirl* v. *Kern,* 407 F. 2d 781 at 790 (5 Cir. 1969), 'An arrest is often a stressful and unstable situation calling for discretion, speed, and on-the-spot evaluation.' To require the police officer, under penalty of personal liability for damages if he is in error, to make on-the-spot complex and intricate legal determinations of the existence or absence of probable cause under the Fourth

> and Fourteenth Amendments when the courts, acting in a more leisurely and relaxed atmosphere, have difficulty in making these decisions is to place the policeman in just such a position of acting at his peril as was declared to be intolerable in *Pierson* v. *Ray, supra,* 386 U. S. at 555, 87 S. Ct. at 1218."

Police officers are given training in arrest procedures, they are not given training in constitutional questions of free expression. This fact makes the Court of Appeals' decision that the Petitioners acted in bad faith gravely suspect, especially in view of the fact that *they never heard them testify.* The basis used for testing the actions of the Petitioners as to the issue of a violation of free speech must be a reasonable one under the circumstances and cannot be viewed from the lofty height of hindsight or in the detached atmosphere of judicial chambers. There is no doubt that an unruly crowd could threaten the safety of the President. This is underscored in importance by the tragic assassinations in recent years. The pressure of a wrong decision in such a stressful situation is evidence of good faith, in and of, itself. This Court pointed out the stress of such a dilemma in *Pierson, supra:*

> "A policeman's lot is no so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted (*sic*) in damages if he does." 386 U. S. at 555.

The most recent case discussing the good faith defense to §1983 actions is *Wood* v. *Strickland,* 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975), which dealt with the liability of school board members for an alleged denial of due process. It is Petitioner's contention that their actions were reasonable in light of the demands of the situation. The District Court so found. This finding is consistent with the rationale for the good faith defense as expressed in *Wood, supra:*

> "The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure . . .
>
> the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." 420 U. S., at 429.

The Court of Appeals quotes sections of this opinion in support of the proposition that the determination of good faith in a §1983 context requires a "knowledge of basic, unquestioned constitutional rights."

While Petitioners readily admit it is not unreasonable to expect police officers to be aware of basic constitutional rights, this is an oversimplification which sheds little light upon the case at bar. First, this incident took place in the "urgency of a street confrontation" and not in the "contemplative atmosphere" of a school board meeting with ready access to legal counsel to explain matters of constitutional rights. Secondly, the interrelationship of street demonstrations involving the President of the United States and First Amendment freedoms can hardly be described as a "basic, unquestioned constitutional right."

In a recent decision reflecting on this question the Fifth Circuit in *Sapp* v. *Renfroe,* 511 F. 2d 172 (5th Cir. 1975) applied the *Wood, supra,* standard to a question dealing with First Amendment freedoms. The Court held that a student's freedom from attending ROTC was not a clearly established constitutional right. Certainly, if a school board is given such leeway in determining such constitutional questions, a police officer acting in a turbulent situation deserves that much more. The question facing the officers in the present case cannot be said to have been more "basic" than that facing the school board in *Sapp, supra.*

Finally, turning to the holding of the Court of Appeals that the Petitioners acted with an invidious discriminatory intent, we are bound by the same considerations as mentioned above regarding the questions of reasonableness and good faith.

The principle case dealing with claims under 42 U.S.C. §1985(3) is *Griffin* v. *Breckinridge,* 403 U. S.

88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971). This Court delineated the requisites of the cause of action:

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U. S., at 102.

Judge Gordon in his opinion in the District Court held that "we find no evidence of 'class-based invidiously discriminatory animus' as required in *Griffin, supra.*" The Court of Appeals reversed, holding that the actions of the police in confiscating and destroying the placard were indeed motivated by invidiously discriminatory animus and therefore the petitioners were in violation of §1985(3).

Again, the findings of the trial court were not clearly erroneous. Fed. R. Civ. P. 52(a). The trial transcript is replete with testimony, the gist of which is that the officers acted only to prevent the proliferation of violence immediately preceding the passing of the Presidential motorcade, and that the officers took and destroyed the placard *ONLY AFTER* the officers perceived a dangerous situation developing.

On Page 66 of the trial transcript Officer Medley was asked:

> "Q. . . . (W)hy did you think it was so imperative that you had to take that sign away from her?
> A. My job was to—protecting the President and to keep the crowd at ease and the crowd was

becoming unruly and I had to get that sign down or the crowd would have become boisterous and maybe hurt the young lady."

Medley's superior officer, Sgt. Johnson, responding to a query regarding the orders given relating to "signs carried by persons" declared:

> "A. They said if signs were of the nature that created disturbances, uh, that to be interested in the President's welfare . . . (and) ask them to remove the signs" (T. 74).

The signs that were not to be permitted, Johnson continued, were signs that would "cause unreasonable reaction of a crowd . . . signs that would cause unreasonable trouble and disorder." (T. 75).

The Court of Appeals erred in stating that "the record is unmistakably clear that (petitioners) intended to permit no criticism of the president that day." When asked whether he would have included signs which were merely "against" the President as examples of the category of "detrimental" signs, Sgt. Johnson replied negatively (T. 75) that he would be concerned exclusively with signs that could "cause danger to the President or anyone else present" (T. 76). Further, Chief of Police Hyde in responding to the question whether any special instructions were given the officers concerning signs, answered:

> "A. . . . the people who carried signs peaceably without causing trouble or inciting people or provoking people, but as long as they were peaceable; the signs didn't have any profanity or obscenity in

them that there would be no—uh, there would be no reason to take any action against those people." (T. 98).

From the above, it is clear that the finding of the District Court that the Petitioners lacked any invidiously discriminatory animus was supported by substantial evidence. We respectfully submit the Court of Appeals is in error.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to review the erroneous judgment of the Court of Appeals below.

Respectfully submitted,

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